Supreme Court, U.S.
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No. 92-1605

IN THE SUPREME COURT

Of The

UNITED STATES

October Term, 1992

PATRICK G. WOOSLEY,
on behalf of himself and all others
similarly situated,
Petitioner, vs.

STATE OF CALIFORNIA, DEPARTMENT OF MOTOR VEHICLES AND STATE BOARD OF CONTROL,
agencies of said State,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF CALIFORNIA

REPLY TO BRIEF OF RESPONDENTS STATE OF CALIFORNIA et al., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *sua sponte* overruling uniform California authority approving class claims for refund of taxes, did the California Supreme Court create an untenable and inadequate state ground for denying members of Petitioner Class herein the protection of this Court's settled anti-discrimination precedent?

2. Where a State intentionally discriminates against interstate commerce, does the Due Process Clause permit retroactive application of a new procedural condition to block relief from facial discrimination?

3. Did the California Court's prohibition of class claims for refund (1) deprive the Petitioner Class of due process by (a) denying them meaningful backward looking relief and (2) violate the principles of *Felder* v. *Casey* 487 U.S. 131 (1988) because the prohibition required them to seek individual redress from an administrative agency that was, pursuant to the State's Constitution, expressly prohibited from granting the relief sought?

4. Is it an undue burden on interstate commerce for a State to collect a fee which it knows to discriminate against interstate commerce and require the targets of the discrimination to file individual claims for refund, particularly to an agency which does not have the power to rule a statute unconstitutional?

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REPLY BRIEF

I. RETROACTIVE IMPOSITION OF A PROHIBITION AGAINST CLASS CLAIMS FOR REFUND IS NOT AUTHORIZED BY MCKESSON

The Brief Of Respondents ... In Opposition To Petition For Writ Of Certiorari ("Opposition" or "Opp.") is confused about the allowable extent and the allowable timing of procedural requirements under *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18 (1990). For convenience, DMV (Dept. of Motor Vehicles) is used herein for all respondents.

A. The California Supreme Court Exceeded McKesson's Limits On Procedural Barriers

As a frame of reference, *McKesson's* principal holding is,

> To satisfy the requirements of the Due Process Clause, ... the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, [footnote] but also a "clear and certain remedy" [citation] for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one." (*Id.* at 39; See also, pages 40 and 51.)

McKesson also holds that "serious economic and administrative dislocation" does not justify a refusal to provide relief. (*Id.* at 49-51, especially n. 35.) In response to the Florida Supreme Court's equity rationale, this Court ruled,

> This ... bespeaks a concern that a state's obligation to provide refunds for what later turns out to be an unconstitutional tax would undermine the State's ability to engage in sound fiscal planning. (*Id.* at 44.)

and listed allowable procedural requirements. Opposition quotes some (at p. 9) but omits the following:

> [E]xecute any refunds on a reasonable installment basis; ... refrain from collecting taxes pursuant to a scheme that has been declared invalid ... pending further review of such a declaration on appeal; and/or place challenged tax payments into an escrow account or employ other accounting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds. (*Id.* at 45.)

McKesson's use of "predict with greater accuracy the availability of undisputed treasury funds," "unpredictable interim revenue shortfalls against which the State cannot easily prepare" and "installment plans" demonstrate that allowable procedural requirements must be reasonable[1] and be aimed at avoiding surprise or *temporary* disruptions. As indicated at Petition for Writ of Certiorari ("Petition" or "Pet.") pages 21-22, DMV was not surprised. At each stage of the litigation -- from the trial court to the Court of Appeal and to the California Supreme Court -- the discriminatory tax was found unconstitutional based on long-settled precedent. And yet, DMV continued to collect the discriminatory tax throughout the 15 years of this litigation. DMV only started the process of eliminating discrimination for the future in 1991 and is still discriminating on some vehicles. Furthermore, no credible reason has been advanced why requiring three million individual claims would further any valid purpose better than one class claim. Re the claim contents argument (Opp. at 12, 14-15), the Court of Appeal held that, "[T]he claim and amended claim filed by plaintiff Woosley are probably far more precise and specific than the average taxpayer refund claim." (App. at 84a, all "App." cites are to the Appendices of the Petition.) The California Supreme Court ("California Court") did not grant review of this ruling.

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[1]See Opposition page 14, line 6.

B. Opposition Misconceives Timing Limitations On Impositions of Procedural Barriers, And The California's Court's Contention That It Was Interpreting Existing Law Is Untenable

DMV argues that imposition of procedural barriers need not be timely (Opp. at 10), but on the next page quotes a passage requiring timely imposition. (*McKesson*, at 24, n. 4.)[2]

Despite Opposition at 11, the California Court's ruling that there existed in 1977 a requirement for individual claims ("the Ruling") is an untenable interpretation of state law threatening to deprive the Class of federal rights.[3] Generally, state law interpretations do not raise federal issues, but the Ruling does here because it violates Due Process, unreasonably burdens commerce, and is an untenable state ground for denying independent federal rights.[4]

Contrary to Opposition at page 9, *Osborne v. Ohio*, 495 U.S. 103, 124 (1990) underscores rather than undermines the untenability of the Ruling. The paragraph from which DMV quotes found Ohio was relying upon an untenable state ground and said,

> As Justice Holmes warned us years ago, "[W]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. [Citation.]" (*Id.* at 125.)

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[2]Also, see *McKesson*, 496 U.S. at 45, n. 28:

> [Citation] (refund claim could be barred if there was "any valid local [limitations] law in force when the claim was filed") ....

[3]Citation at Opposition page 11 to Appendix page 45a is inappropriate; use taxes are no longer at issue herein. (Pet. at 3.)

[4]Not all questionable state law interpretations raise federal issues; California Court's use tax interpretation, which saved over $500 million, is not challenged herein. (See App. at 74a-82a; 277a-281a.)

The Class' federal claims were plainly and reasonably made. (See, App. at 82a-87a.) DMV's quotation is simply a characterization of one argument, not the sole definition of an untenable state ground.

II. DUE PROCESS BARS STATES FROM PROHIBITING CLASS CLAIMS BY SYSTEMATICALLY OVERCHARGED CLASSES, BUT EVEN IF CLASS CLAIMS COULD BE PROHIBITED, DUE PROCESS REQUIRES PROSPECTIVE-ONLY APPLICATION

Opposition at 16-17 extrapolates to the false premise that States can deny class relief even where class relief is the only way to provide due process.[5] At pages 19-22, Petition sets out the proper analysis under the teachings of *Mathews v. Eldridge*, 424 U.S. 319 (1976). DMV's prospectivity discussion (Opp. at 12-13) has several flaws. It discusses abstention in a vacuum, where federal rights were not impinged. While state requirements are generally state law questions, the requirements must satisfy federal standards when they impinge on federal rights, as here.

III. OPPOSITION ATTEMPTS TO MISLEAD

Opposition attempts to create numerous illusions to confuse the case. First, DMV suggests that the Petition is moot because the California Court ruled in Woosley's favor as an individual (Opp. at 4, 6, 13.), but he is also the certified representative of a class ("the Class," Pet. at 1). The Class' rights have been trampled, not Woosley's.

Second, DMV argued that its clerks could not be expected to know that they were violating the Commerce Clause (Opp. at 3); however, DMV's management knew

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[5]Federal income tax cases cited (at Opp. 10, n. 5) are not persuasive on the federal Constitution's requirements for States. A class income tax proceeding would have to deal with all income and expenses of the class members, an impossible task. (See, App. at 287a, n. 1.) Also, apparently due process was not argued.

(App. at 130a-133a) and lobbied the Legislature repeatedly for change, and was repeatedly rebuffed. (App. at 138a.)

Third, DMV misleadingly argued (Opp. at 5) that because it briefed the California Constitution, the Class was not surprised by the Ruling. The Class was surprised by the court's *sua sponte* and untenable definition of "agent" as used in Vehicle Code section 42231 to exclude a class representative as agent. (See App. J herewith for Vehicle Code section 383.1, the predecessor to section 42231.) If there were to be a valid procedural prerequisite to the protection of a federal right, it has to be reasonably apparent at the time it had to be satisfied.

Fourth, DMV argues (Opp. at 10) that Woosley's win proves that procedural requirements did not thwart constitutional rights. The reason that Woosley's rights were not thwarted was because he expected litigation costs to be shared with the Class, the only reasonable interpretation of the law at that time. It is not reasonable to assume that he would have protected his rights, in face of procedural precedent to the contrary, in search of a pyrrhic victory. It is also not reasonable for an individual to spend tens of thousands for costs, or for a law firm to conscientiously advance litigation for over 15 years in pursuit of an individual entitlement averaging about $100 ($2000 in Woosley's case).

Prospective vehicle purchasers had the alternative of (1) purchasing out-of-state vehicles with high fees, filing individual refund claims, and suing,[6] or (2) purchasing vehicles originally sold new in California with low fees. Most purchasers would be enticed by this discrimination toward

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[6]This is an enormous burden: the Superior Court filing fee is over $100 and the Court of Appeal filing fee is $200, plus other costs and fees -- all for a typical $80-$100 intentional overcharge. The trial court implicitly found the trial court Lodestar was at least a million dollars. (App. at 268a, 95a.)

purchasing California vehicles, achieving the very objective this Court's settled precedent prohibits. (This California vs. out-of-state distinction has nothing to do with smog requirements.)

Fifth, DMV invalidly relies on Tax Injunction Act cases to show that refund procedures satisfy due process. (Opp. at 16.) The issue under that act is whether procedures are sufficient to allow state courts to monopolize litigation of state taxes, not whether the state courts are exempt from the Constitution.[7]

Sixth, now that DMV's scare tactics have elicited the Ruling, DMV whitewashes those tactics. (Opp. at 5.) DMV's petition to the California Court seeking its review (at 3, including a note) argued:

> The questions presented by this case are highly significant questions of law that are very important to the State of California. The impact of the case on the budgets of cities, counties and the state itself should the decision herein not be reversed is estimated at more than one *billion* dollars (approximately $1,356,000,000). The amount subject to refund for the threatened 16-year refund period ... is estimated to be *$556[8] million in use tax and as much as $800 million in vehicle license fees. The total estimated liability is $1,356,000,000. By comparison, the fiscal cost to the State of California for the 1989 San Fran-

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[7]Further, *Waldron v. Collins* 788 F.2d 736 (11th Cir.1986), distinguished *Garrett v. Bamford*, 538 F.2d 63 (3rd Cir.1976) (absence of class procedure *justified federal court litigation, taxes challenged as systematically infringing federal rights*). Here, important Commerce Clause rights are being systematically infringed.

[8]Substantially all of this $556 million is no longer at issue because the California Court found on adequate state grounds that use taxes after 1976 were correct. (For that reason, this estimate is marked with an * each time it appears.) If DMV's estimates were correct, only the $800 million would be at issue before this Court.

> cisco Earthquake, which led to the one-quarter percent increase in the sales and use tax rate ..., is estimated to be $800 million. (Emphasis in original.)

DMV's continued hammering of "$1,356,000,000" after the California Court agreed to a review belies argument that it was being argued to encourage exercise of discretionary review. DMV's Opening Brief On The Merits (at 2), framed one question:

> (b) ... If it is a correct interpretation of the statute, does the fact that it is not promulgated as a regulation ... necessitate the refund of *$556 million in use taxes?

and at page 3 it argued:

> This case involves a class action challenge to the state's administrative interpretation of statutes relating to the Vehicle License Fee (VLF) and use tax. The amount subject to refund for the threatened and still-running period ... currently is estimated to be approximately *$556 million in use tax and as much as $800 million in vehicle license fees. The total current estimated liability is $1,356,000,000.[9]

DMV coordinated with an *amicus* brief of the County Supervisors Association and ten counties -- Los Angeles,

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[9]DMV's Reply Brief repeated the unsupported $1.4 billion estimate (at 28, n. 9) and DMV's Supplemental Brief Re Class Action ..., at 20, increased the unsupported estimate to $1.5 billion.

> Imposition of the class action remedy by the courts has extended the period of litigation to 14 years, has resulted in a massive growth in the class as designated by the trial court, and has exposed the public fisc both to an aggregate potential liability estimated to exceed $1.5 billion and to potential cost of class claim administration now approaching an estimated $100 million. This is not a situation where convenience and efficiency is being served by the class action process.

San Francisco, Butte, Contra Costa, Del Norte, Kern, Madera, Mariposa, Shasta, and Solano -- which argued (on p. 1):

> In entering and affirming a judgment in favor of respondent [Class] the courts below allowed a refund which appellants [DMV] estimate at $1.356 billion, approximately $433 million of which will be the responsibility of the counties. The fiscal impact of such a refund would be devastating. *Consequently procedural prerequisites to litigation should be strictly enforced.* (Emphasis added.)

DMV's argument (Opp. at 5) that the amounts were being argued to challenge the propriety of class certification, is also unconvincing. As shown by the Superior Court's findings of fact (App. at 231a-262a, accepted by the California Court App. at 5a), the class size increases the relative efficiency of class mechanisms compared to individual mechanisms.

The California Court signaled that it understood DMV's message. It wrote,

> Finally, we decide whether the class claim filed in this case was authorized by statute. The state estimates that the current amount of the refund of vehicle license fees and use taxes under the judgment appealed from exceeds $1 billion. (App. at 2a.)

IV. THIS ACTION IS FINAL WITHIN 28 U.S.C. §1257's MEANING BECAUSE THE SUPERIOR COURT IS POWERLESS TO REDRESS THE CALIFORNIA COURT'S DEPRIVATION OF THE CLASS' FEDERAL RIGHTS

DMV argues that the Petition is premature -- that it lacks the finality required by 28 U.S.C. §1257 (Opp. at 6, n. 3.); simply stated, DMV is wrong. DMV would, no doubt, be quick to argue that the Petition was untimely if the Class

had waited until after the Superior Court implemented the California Court's directions.

The California Court's judgment is "subject to no review or correction in any other state tribunal." *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548, 551 (1945). It is the "final word of a final court." *Id.*

The federal matters of which the Class complains have been finally adjudicated. The tasks remaining in the trial court cannot have the slightest impact on the federal determinations of the California Court that form the basis of the Petition. The California Court has determined that no former member of the certified class who failed to make an individual claim can recover in this action. This ruling is final, and is susceptible to no further interpretation in the lower state courts.

The remaining task of the California trial court is limited to a head count of those prescient taxpayers, schooled in Commerce Clause precedent, who recognized the unconstitutionality and filed a refund claim on that ground. If the number is insufficient, the action cannot remain a class action. No party has suggested that there is anyone other than Woosley meeting the criteria. (See Pet. at 5.) However, undoubtedly the vast majority of the Class did not file and they have no further presence in the state court proceeding. Those few that remain in have no federal issues.

The California Court has determined that even though the state's constitution expressly forbids agencies from determining any statute unconstitutional (Cal. Const. art. III, §3.5), nonetheless the failure of taxpayers to seek individual redress from these agencies on the forbidden constitutional grounds bars their participation in the previously certified class. This determination also is final, and is susceptible to no further state review. The possibility that some former class members may be able to file another action

does not deprive *this action* of finality, all that is required by section 1257.

The California Court has determined that no notice need be given to the several million class members who have now been eliminated from the previously certified class, even though the statute of limitations on their individual claims is running. (App. at 49a-50a.) This determination too is final, and brooks no interference from the trial court.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477 (1975) teaches that where, as here, there are further proceedings yet to occur in the state court, but the federal issues have been conclusively determined and the outcome of the further state proceedings cannot moot them, the judgment of the highest state court is deemed final. *(Cox*, 420 U.S. at 479.)

The federal determinations of the California Court which form the basis of the Petition will survive and require decision regardless of the outcome of the limited future state court proceedings. (Compare *Cox*, 420 U.S. at 480.)

Thus, respondents' finality argument is without merit.

Respectfully submitted.

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APPENDIX J
Vehicle Code Section 383.1 (1945)

383.1. Procedure for Refund of Fees. (a) Whenever application is made by any person for the registration or transfer of registration of a vehicle or for any other privilege specified in this code and such application is accompanied by any fee which is excessive or not legally due, or whenever the department in consequence of any error either of fact or of law as to the proper amount of any fee or any penalty thereon or as to the necessity of obtaining a registration, transfer of registration or other privilege under this code collects any fee or penalty which is excessive, erroneous or not legally due, the person who has paid any such erroneous or excessive fee or penalty, or his agent on his behalf, may apply for and receive a refund of the amount thereof as provided in this section.

(b) The applicant may within not more than one year from the date of payment of such erroneous or excessive fee or penalty present an application in writing to the department identifying the payment made and stating the grounds upon which it is claimed that such payment was excessive or erroneous.

(c) Whenever any fee or penalty subject to refund under the provisions of this section has not been paid into the State treasury, the department shall refund the fee or penalty.

(d) Whenever any fee or penalty subject to refund under this section has been paid into the state treasury to the credit, in whole or in part, of the Motor Vehicle Support Fund or of the Motor Vehicle Fund, the department shall prepare a claim setting forth the facts pertaining to the fee or penalty sought to be refunded and, upon approval of the claim by the Director of Finance, the Controller shall draw his warrant upon the fund or funds to which the fee or penalty was credited.

(e) This section shall be effective as a legislative appropriation of any and all amounts necessary to refund and repay any excessive or erroneous fees and penalties collected under this code and the procedure herein prescribed shall be deemed a compliance with the requirements of the Political Code of this State in reference to the refund of excessive or erroneous fees or penalties paid to the Department of Motor Vehicles.

(f) The provisions of this section shall also apply in the event application has been made and fees have been paid for the registration of a vehicle which is not in fact operated upon the highways of this State, but in such event application for refund shall be made within 60 days after the date such fees are paid to the department.

(Statutes of California 1945, chapter 1250, section 3.)